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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1791

FIRST NATIONAL BANK OF COMMERCE,
Petitioner,

vs.

DIMITRI T. SKOURAS, as TRUSTEE OF
THE NORTH PLAZA TRUST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the California Court of Appeal
Second Appellate District

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PETITION FOR A WRIT OF CERTIORARI
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Second Appellate District

The petitioner First National Bank of Commerce respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Second Appellate District, entered in this proceeding on March 5, 1979.

OPINION BELOW

Neither the California Court of Appeal nor the California Supreme Court issued an opinion.

JURISDICTION

The order of the California Court of Appeal, Second Appellate District, denying the Petition for Writ of Man-

date was entered on March 5, 1979. The Supreme Court of California denied a petition for hearing on April 12, 1979. The order is thus a final judgment reviewable by writ of certiorari. *Mercantile Nat. Bank v. Langdeau,* 371 U.S. 555, 558, 9 L.Ed.2d 523 (1963). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

May a national bank be found to have waived the provisions of 12 U.S.C. Section 94 merely by doing business in a state or must plaintiff show that the bank voluntarily and intentionally waived the protection of the statute?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 12:

§ 94. VENUE OF SUITS:

> Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

STATEMENT OF THE CASE

Petitioner First National Bank of Commerce (FNB) is a national bank located in Louisiana with no branches in any other state. FNB has never sought the aid of the California courts and has not regularly conducted business in that state other than as is incident to the normal workings of the national banking system.[1]

[1]For example, FNB sometimes participates in loans made by California banks, and has a correspondent relationship with the Bank of America.

In 1973, FNB purchased forty-nine percent of the shares of a California investment corporation called First Southern Capital Corporation (First Southern). Thereafter, the corporation operated from Louisiana and neither maintained a California office nor made California investments. It owns no California real property and has no employees in that state. Neither the purchase of the First Southern stock by FNB nor the operation of that corporation while FNB owned that stock is in dispute in this or any other action.

Four years later, in 1977, FNB sold all of its shares of First Southern to Crabtree Investments, Inc. (Crabtree), a Louisiana corporation. All negotiations for, and the execution of, that sale were conducted in Louisiana. Six months after the sale was consummated, Crabtree reduced the First Southern Board of Directors from twelve members to six.

Dimitri Skouras then filed an action in the California Superior Court in Los Angeles on August 10, 1978, alleging that FNB received a "premium" in the sale of its First Southern stock, and that Crabtree had improperly reduced the number of directors.

Neither FNB nor Crabtree have offices, branches or employees in the state of California, and all of the challenged transactions and events in the underlying action occurred in Louisiana. Thus, all of the percipient witnesses and relevant documents in the underlying action are in Louisiana, across the country from where plaintiff Skouras seeks to bring his action.

FNB did not make a general appearance in the Skouras action but moved to quash the service of summons upon it

on the ground that Section 94 prohibited bringing the suit in California. The trial court, acting through a commissioner, denied the motion on February 6, 1979. California Code of Civil Procedure Section 418.10(c) expressly provides for review of such orders by writ of mandate, and FNB timely filed a petition for a writ of mandate on February 26, 1979. By order dated March 5, 1979, the California Court of Appeal, Second Appellate District, denied that petition. The California Supreme Court denied a petition for hearing on April 12, 1979.

REASONS FOR GRANTING THE WRIT

1. The California Courts' Interpretation Of The Waiver Exception To Section 94 Effectively Repeals The Statute And Is Contrary To Both Analogous Decisions Of This Court And To Direct Holdings Of The Circuit Courts of Appeals

Although the command of Section 94 that national banks may be sued only where they are located is mandatory and binding on all state courts,[2] the statute, and the congressional intent behind it, have been avoided by some California courts through the device of expanding an implied waiver exception to defeat the statutory mandate.

In 1889, this Court decided that a national bank could waive the protection of what is now Section 94 by failing to assert it until the appeal after losing a trial on the merits. *First National Bank of Charlotte, North Carolina v. Morgan,* 132 U.S. 141, 33 L.Ed. 282 (1889). This Court

[2]*Mercantile Nat. Bank v. Langdeau,* 371 U.S. 555, 9 L.Ed. 2d 523 (1963).

has never delineated the bounds of that doctrine, however,[3] and that guidance is now sorely needed.

The California courts have decided that if a national bank is doing business in California, it has waived the protection of Section 94. *See, Levine v. Second Nat. Bk. of Danville,* 63 Cal.App. 3d 258, 133 Cal.Rptr. 697 (1976); *Michigan Nat. Bank v. Superior Court,* 23 Cal.App. 3d 1, 99 Cal. Rptr. 823 (1972).[4]

That test, however, would subject national banks to suit in almost every state solely on the incidents of national banking, thus defeating the purpose of the statute and rendering it meaningless. For this reason, the Court specifically rejected an analogous interpretation of Section 94 in *Mercantile Nat. Bank v. Langdeau,* 371 U.S. 555, 560, 9 L.Ed.2d 523 (1963):

> Appellee, however, would have us hold that any state court could entertain suit against a national bank as long as state jurisdictional and venue requirements were otherwise satisfied. Such a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county. This we are unwilling to do, particularly in light of the history of § 57.

The same result should follow here. Indeed, a "doing business" test has specifically been rejected by several

[3]In *Michigan Nat. Bank v. Robertson,* 372 U.S. 591, 9 L.Ed.2d 961 (1963) and *National Bank v. Associates of Obstetrics,* 425 U.S. 460, 48 L.Ed.2d 92 (1976), the Court declined to consider what conduct would be sufficient for waiver because the issue had not been decided below. *See also, The Chase Manhattan Bank v. Sailboat Apartment Corp.,* 429 U.S. 911, 50 L.Ed.2d 278 (1976).

[4]In effect, these courts hold that if the minimum contacts due process test for *in personam* jurisdiction is met, the bank has "waived" the protection of Section 94.

courts of appeals in decisions which were ignored by the California courts in the instant case. *E.g., Northside Iron & Metal Co., Inc., v. Dobson & Johnson, Inc.,* 480 F.2d 798, 800 (5th Cir. 1973); *Helco, Inc. v. First National City Bank,* 470 F.2d 883, 885 (3rd Cir. 1972).

The present situation closely parallels the earlier conflict over whether Section 94 is mandatory or permissive which was resolved in *Mercantile Nat. Bank v. Langdeau, supra,* 371 U.S. 555. All of the federal courts which had considered that question held that Section 94 is mandatory, while the state courts split on the issue. *Id.* at 562 n. 13. The same concerns that caused this Court to resolve the prior conflict also compel consideration of the issue presented here; the problem is identical except that instead of avoiding the statute by finding it "permissive," state courts are now finding that it was "waived."

Unless this Court resolves the question, Section 94 will be upheld or avoided solely on the accident of whether a federal or state court entertains the suit. If the suit is in a federal court, Section 94 is given effect and waiver is not found in the absence of a voluntary and intentional relinquishment of the right. In the state courts, however, the mandate of Section 94 is sometimes disregarded on the pretext of waiver. The enforcement of federal rights should not turn on whether the question is presented in a state court or a federal court. *Cf., Guaranty Trust Co. v. York,* 326 U.S. 99, 112, 89 L.Ed. 2079 (1945). This Court was given the power to settle such questions precisely to avoid this problem. *See, Lego v. Twomey,* 404 U.S. 478-479 n. 1, 30 L.Ed.2d 618 (1972). The exercise of that power is needed here.

2. A Waiver Of Section 94 Can Only Occur If There Is A Voluntary And Intentional Relinquishment Or Abandonment Of The Privilege

The command of Section 94 that national banks may only be sued where they are located is "mandatory" and "exclusive." *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 152, 48 L.Ed.2d 540 (1976); *Mercantile Nat. Bank v. Langdeau, supra,* 371 U.S. at 560. "Congress intended that in those courts alone could a national bank be sued against its will." *Citizens & Southern Nat. Bank v. Bougas,* 434 U.S. 35, 41, 54 L.Ed.2d 218 (1977) (quoting *Mercantile Nat. Bank v. Langdeau, supra,* 371 U.S. at 560).

Accordingly, the statute has "generally been construed narrowly and strictly." *Bechtel v. Liberty Nat. Bank,* 534 F.2d 1335, 1339 (9th Cir. 1976). As Justice Frankfurter noted in *Olberding v. Illinois Central R. Co.,* 346 U.S. 338, 341, 98 L.Ed. 39 (1953) (concerning 28 U.S.C. § 1391(a)):

> The requirement of venue is specific and unambiguous; it is not one of 'hose vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction.

An implied waiver of Section 94 should therefore not lightly be inferred:

> If proof of a waiver rests on one's acts, 'his act[s] . . . should be manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible.' [Citation.]
>
> *Bechtel v. Liberty Nat. Bank, supra,* 534 F.2d at 1340.

Where the bank makes a general appearance and, after losing a trial on the merits, objects to venue for the first time on appeal, or where the bank itself brings suit in a foreign jurisdiction, provoking a counterclaim, the waiver standard is easily met. However, where the bank is merely doing some business in the state, but has no branches, offices or employees there, it cannot reasonably be said that the bank has intended to relinquish its right to be sued only where it is located.

This Court should adopt the standard espoused by the Third, Fifth, Seventh, Eighth and Ninth Circuits[5] that waiver of Section 94 requires a voluntary and intentional relinquishment that may not be implied merely by doing business in the state, but may only be found by conduct clearly manifesting an intent to waive the privilege.

In the instant case, that standard cannot be met. FNB has no branches, offices or employees in California and raised the venue objection by special appearance rather than making a general appearance in the underlying case. Moreover, FNB has not employed the courts of California to file complaints or cross-complaints.

The only connection the underlying case has to California is that FNB purchased stock in a California corporation. Just as driving through a state does not waive venue

[5]*Bechtel v. Liberty Nat. Bank, supra,* 534 F.2d 1335; *Northside Iron & Metal Co. v. Dobson & Johnson, Inc., supra,* 480 F.2d 798; *Helco, Inc. v. First National City Bank, supra,* 470 F.2d 883; *Buffum v. Chase Nat. Bank of City of New York,* 192 F.2d 58 (7th Cir. 1951); *Fisher v. First National Bank of Omaha,* 338 F.Supp. 525 (S.D. Iowa), *appeal dismissed,* 466 F.2d 511 (8th Cir. 1972). *See, Klein v. Bower,* 421 F.2d 338 (2d Cir. 1970).

rights,[6] purchasing stock in a corporation which happens to be incorporated in another state does not manifest a knowing and voluntary relinquishment of the right of a national bank to be sued where it is located.

Requiring FNB to defend the Skouras action in California also violates basic concepts of fairness and justice. All percipient witnesses and relevant documents are in Louisiana, and Crabtree can only be sued in Louisiana.[7] Only the plaintiff's attorneys reside in the attempted forum of the underlying lawsuit; plaintiff Skouras resides in Napa, California, which is several hundred miles from Los Angeles. There is, therefore, no valid reason to maintain this action in Los Angeles, and that forum imposes a considerable hardship on FNB which is located across the country in New Orleans.

It is important to note that not only must FNB's records be transported to Los Angeles County in order for the bank to defend itself, but its employees and officers would be required to travel there also, further disrupting the bank's business. Moreover, since California cannot compel the attendance at trial of Louisiana residents, much of the evidence may have to be introduced by deposition excerpts rather than live testimony. To defend itself where it has no branch office, no business relationship or any other contact and, indeed, where the only contact is the residence of plaintiff's attorneys, not only places an undue and unfair burden on the bank, but threatens basic concepts of justice.

[6]*Olberding v. Illinois Central R. Co.,* 346 U.S. 338, 98 L.Ed. 39 (1953).

[7]Crabtree's motion to quash the summons served upon it in the underlying action is pending in the Los Angeles superior court.

See, Kulko v. California Superior Court, 436 U.S. 84, 56 L.Ed.2d 132, 144-145 (1978).

The inconvenience and hardship of litigation in a distant forum such as Los Angeles is precisely the reason that Congress enacted Section 94. This Court should not permit that congressional intent to be thwarted.

CONCLUSION

Despite the mandatory provisions of Section 94 of the National Bank Act, providing that national banks may only be sued in the county where they are located, and despite the undisputed fact that FNB is a national bank not located in California, the California courts have refused to enforce that statute and to quash service of the summons on the bank.

We respectfully submit that not only were these rulings plainly erroneous and place an unwarranted burden on the bank by forcing litigation in California, when the only percipient witnesses and relevant documents are in Louisiana where all the transactions in question occurred, but they pose a threat to the orderly functioning of government.

The recognition of federal rights cannot be permitted to rest on the happenstance of whether a federal or a state court is asked to enforce the statute. Yet California has refused to follow the clear federal authority on the conduct required for a waiver of the provisions of Section 94 and has instead expanded the waiver exception to swallow the statute.

Only this Court can provide the required parameters of the waiver rule, and only this Court can bring conflicting

federal and state authorities into line so that the federal statute in question has the same meaning in every state and in every court.

The Court is respectfully requested to grant this Petition for a Writ of Certiorari, to establish the limits of the waiver doctrine, and to rectify the injustice that was done in this case.

Dated: May 18, 1979.

Respectfully submitted,

JAY R. MARTIN
PETER W. DAVIS
CROSBY, HEAFEY, ROACH & MAY
PROFESSIONAL CORPORATION

By PETER W. DAVIS
Counsel for Petitioner

(Appendices Follow)

Appendices

Appendix A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

APR 12 1979

I have this day filed Order .....

HEARING DENIED

In re: 2 Civ No. 55516

First Natl Bank
vs.
Sup Ct

Respectfully,

G. E. BISHEL
Clerk

Appendix B

Superior Court of California,
County of Los Angeles
Dept. 66

Date	February 6, 1979
	Judge
Honorable Arnold Levin	Judge Pro Tem
None	Deputy Sheriff
P. Pappas	Deputy Clerk
None	Reporter

C 250885
Dimitri T. Skouras, etc.

vs.

First National Bank of Commerce,
a national bank, etc., et al.,

Counsel for Plaintiff
Munger, Tolles & Rickershauser

Counsel for Defendant
Jay R. Martin
Eric G. Wallis
Crosby, Heafey, Roach & May
Michael Q. Eagan

Nature of Proceedings.

Motion of defendant First National Bank of Commerce to quash service of summons and to dismiss complaint

(Submitted Matter)

In this matter, heretofore taken under submission February 2, 1979, the Court renders its decision as follows:

Motion DENIED.

Counsel for plaintiff to give notice.

On the Court's own motion, the time for seeking a writ pursuant to C.C.P. Section 418.10(c) is extended to 20 days from the date of this order.

Copy of this minute order is sent this date by U.S. Mail to counsel for the respective parties.

Minutes entered 2/6/79—County Clerk

Appendix C

In the Court of Appeal
of the
State of California

Second Appellate District

Division Three

2d Civil No. 55516
(Super. Ct. No. C250885)

First National Bank of Commerce,
a national bank,
Petitioner,

vs.

The Superior Court of California,
County of Los Angeles,
Respondent,

Dimitri T. Skouras,
Real Party in Interest.

[Filed Mar. 5, 1979]

ORDER

THE COURT:

The petition for writ of mandate, filed herein on February 26, 1979, has been read and considered. The petition is denied for failure to state facts sufficient to justify the relief sought.